Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
À La Carte and Themed Tier	)	
Programming and Pricing Options	)	MB Docket No. 04-207
For Programming Distribution on	)	
Cable Television and Direct Broadcast	)	
Satellite Systems	)	

To: Chief, Media Bureau

COMMENTS OF COURTROOM TELEVISION

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SUMMARY

Regulations affecting the distribution of multichannel programming are unnecessary in a market that works efficiently and offers consumers abundant, diverse video programming. The essential question raised by the Commission's Public Notice is this: What would be the effect if the government forced multichannel video providers to "voluntarily" provide an à la carte option to subscribers? In this regard, the major economic issues raised in the Notice already have been thoroughly explored by the FCC, the GAO, and independent economists. In its most recent annual video competition report, for example, the FCC found that bundling results in lower prices generally and benefits new or niche channels through increased subscriber awareness. Similarly, the GAO concluded that à la carte carriage could cause cable rates to rise and diversity to diminish. The bottom line conclusion is that à la carte regulations would not help consumers and would seriously harm programmers.

Multichannel video programming distributors ("MVPDs") have historically provided a broad range of choices that includes niche channels that may be viewed infrequently, corresponding to the "surfing" manner in which most viewers watch television. The economic foundation of the MVPD industry is based on this packaging model, with cable networks specifying bundling requirements or tier placement to ensure the widest possible coverage and to maximize advertising revenue and affiliate fees. There are also economies of scale in offering programming networks in broad

service tiers, which lower transaction costs and enhance the value of the service for consumers. The result of this economic model has been to produce an unprecedented array of diverse programming networks and an increasingly competitive environment for video programming.

For multichannel programmers, obtaining carriage in packages with high penetration is critical to survival. In recent years, Court TV offered significant financial inducements to gain access to MVPD platforms as part of broad programming packages, and the resulting affiliation agreements were predicated on placement in the most widely distributed packages. Any governmental requirement to sell cable programming on an à la carte basis would change the economic model on which Court TV and most other cable networks developed, abrogate these contractual arrangements and override negotiated package placement provisions.

Such rules also would undermine the way in which programming channels are marketed to subscribers, and thus drive up costs. In order to survive in an à la carte environment, Court TV would have to devote millions of dollars to rebranding and remarketing its service, rather than using that money to develop original programming. In a pure à la carte environment, Court TV would have to charge customers at least $5.00 per month and maintain at least 85 percent of its current expanded basic carriage in order to remain profitable, but at that price it is estimated that only about 0.3 percent of cable subscribers would purchase Court TV. Thus, an à la carte carriage obligation

would require substantial changes in Court TV's marketing efforts, its ability to produce original programming, its ad revenues and affiliate license fees, its profitability, and its likelihood of survival.

New and niche programmers that grew up under cable's prevailing business model would be stillborn in such an environment. Most networks could not continue as advertiser-supported networks or exist as subscription "premium" services, and they thus would likely go dark, further reducing the diversity of programming available to consumers. The result for consumers would be reduced choice and an expensive à la carte option that might benefit only the lightest cable television viewers, who already have a low-cost lifeline option available.

Based on these economic realities, an à la carte requirement would neither increase consumer choice nor effectively reduce prices. As an initial matter, an à la carte requirement also would require most consumers to invest in equipment upgrades just to take advantage of the option. Increased per-channel prices due to increased marketing costs and decreased advertising revenues would result in consumers paying more overall for less programming, as the various economic studies, including the GAO Report, have found.

Although some advocates of regulation point to the Canadian experience with à la carte, that situation is not comparable to the U.S., and, if anything, demonstrates the general unpopularity of the à la carte option. The limited interest in purchasing cable

services à la carte is demonstrated by the experience on Canadian cable systems, where digital cable subscribers can purchase a number of networks on an à la carte basis. This pricing system and the availability of individual channels has not been a success with Canadian cable subscribers. Moreover, cable television is highly regulated in Canada, where rules restrict importation of cable programming from the United States and give priority to the carriage of Canadian programming services. Finally, cable service in Canada is a secondary market and certain services can be made available only because the larger U.S. market exists.

Any proposal that would require cable networks to be available on an à la carte basis is likely to fail constitutional review under either strict or intermediate scrutiny, even if it is characterized as "voluntary" à la carte. Cable regulations predicated on government antipathy for particular speech or given speakers must be analyzed under strict First Amendment scrutiny, requiring the government to demonstrate that the regulation is needed to serve a compelling interest and that no less restrictive alternatives exist. Recent à la carte proposals, such as those supposedly designed to foster "family friendly" programming, are clearly predicated on a desire to control programming content. Any such mandate necessarily intrudes on cable operators' editorial choices regarding the mix of programming services they offer and is presumptively invalid. An à la carte regime is not the least restrictive means of achieving any of the interests asserted by proponents of regulation.

Even if a government-mandated à la carte regime is considered content-neutral, it still is subject to "intermediate" review, under which the government must show that its regulations will directly and materially serve an important interest and are narrowly tailored. In this regard, an abstract interest in lowering individual cable bills or creating more choice does not establish the required governmental interest. Nor can à la carte advocates prove that such rules would serve their purported interests in a "direct and material way," regardless of the justification for imposing such requirements. A forced à la carte option would not promote viewer "choice" in any meaningful sense and any justification for such rules as a means to avoid "indecent" programming is poorly tailored to achieve this objective. The available evidence strongly suggests that à la carte rules would be counterproductive.

Ultimately, an à la carte requirement is not narrowly tailored to address the asserted interests and would burden far more speech than necessary. The loss of subscriber fees and advertising revenues would force programmers to cut back on the quantity and quality of original programming and would imperil many networks, especially niche programmers that appeal to only portions of the total viewing market. As a result, an à la carte system would restrict the flow of speech by imposing an economic model that will produce less original programming, fewer options, and reduced diversity.

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To: Chief, Media Bureau

COMMENTS OF COURTROOM TELEVISION

Courtroom Television Network LLC ("Court TV"), by its attorneys, hereby files its comments in response to the Media Bureau's Public Notice requesting comment in the captioned proceeding. DA 04-1454, released May 25, 2004. The Media Bureau initiated this proceeding in response to the requests of certain members of Congress who asked the Commission for comment on issues concerning the provision of à la carte and "themed tier" packages of programming on cable television systems and on the platforms of other multichannel video programming distributors ("MVPDs"). As Court TV will discuss herein, regulations affecting the distribution of multichannel programming are unnecessary in a market that works efficiently to offer consumers abundant, diverse video programming. Requirements to provide à la carte or themed tiers would destroy existing cable networks, discourage the emergence of new networks, disrupt business models, and lead to higher prices for consumers and, even if

adopted as a "voluntary" system, would fail to survive constitutional review under either strict or intermediate scrutiny. Furthermore, if any consumers realize a benefit from à la carte or themed tier carriage, it will be only those who view the least amount of cable television and who already have a low-cost lifeline option available.

INTRODUCTION

The issues raised in the Bureau's Public Notice are not new. The Commission, the GAO, independent economists, and the cable industry all have examined the issues underlying à la carte channel offerings for years. In each of its last five annual video competition reports, the Commission has reviewed how video program distributors package and market their programming and the extent to which distributors offer programming on an à la carte basis.[1] Last year, in an effort to take a broader view of the video marketplace, the Commission specifically sought input on this issue.[2] After considering the comments submitted, it concluded that "[b]undling programming channels into packages allows greater penetration of individual channels which lowers the per subscriber price MVPDs pay to programmers and benefits new or niche

[1] *See Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 13 FCC Rcd. 24284, 24387-89 (1999) ("*1998 Video Competition Report*"); 15 FCC Rcd. 978, 1064-65 (2000) ("*1999 Video Competition Report*"); 16 FCC Rcd. 6005, 6085 (2001 ("*2000 Video Competition Report*"); 17 FCC Rcd. 1244, 1316-17 (2002) ("*2001 Video Competition Report*"); and 17 FCC Rcd. 26901, 26964-65 (2002) ("*2002 Video Competition Report*").

[2] *See Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*), 18 FCC Rcd. 16042, 16046 (2003) ("*2003 Video Competition NOI*").

channels through subscriber awareness that is necessary for the survival of such new programming, especially when it is not associated with a 'brand name' entity."[3]

At the same time, pursuant to a congressional request the General Accounting Office conducted a comprehensive review of the issue.[4] Although it acknowledged that policymakers and consumer advocates have raised concerns about packaged cable programming, the GAO found just last October that numerous factors make à la carte carriage an unattractive alternative that would cause cable rates to rise and diversity to diminish. GAO Report at 30. Smaller networks or those providing specialty programming would likely be harmed the most under an à la carte system, and launching a new network would be especially difficult. The GAO also found that programming quality might be adversely affected as à la carte offerings reduced both affiliate fees and advertising revenue. *Id*. at 36-37. With respect to consumer choice, the GAO Report noted, too, that subscribers may place value in having the opportunity occasionally to watch networks they typically do not watch. *Id*. at 37.

Notwithstanding these recent findings, the Commission issued the instant Public Notice to gather information necessary to respond to specific requests from several

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[3] *Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Services*), 19 FCC Rcd. 1606, 1705-06 (2004) ("*2003 Video Competition Report*").

[4] U.S. General Accounting Office, Issues Related to Competition and Subscriber Rates in the Cable Television Industry, GAO-04-8 (Oct. 2003) ("GAO Report"). The GAO Report was prepared in response to a request from Senator John McCain, Chairman of the Senate Committee on Commerce, Science and Transportation.

members of Congress.[5] In these comments, Court TV addresses the questions raised in the Public Notice. First, however, it is important to examine the historical context in which cable television and newer multichannel video programming distributors evolved.

DISCUSSION

I. THE MARKET FOR VIDEO PROGRAMMING IS DIVERSE AND OFFERS CONSUMERS MORE CHOICE THAN EVER BEFORE

From its beginnings as little more than an antenna service for hard-to-receive broadcast signals to the present where subscribers have their choice of over 300 cable networks, the cable television industry is part of a larger market for video programming that provides consumers with an unprecedented level of choice, ranging from broad "mass interest" channels to specific niche channels that serve a growing array of special interests.[6] This diversity of content developed in a marketplace that is largely free from FCC programming mandates, yet the result was the availability of "public interest" programming that vastly exceeds what is available from over-the-air broadcasting.[7] As

[5] Similarly, the FCC's Public Notice is a response, in part, to a May 18, 2004 letter from Congressmen Barton, Dingell, Markey, and Deal and a May 19, 2004 letter from Senator McCain.

[6] *See generally 2003 Video Competition Report*. Even before the advent of satellite-delivered programming, cable operators packaged local television channels together and sold them to customers as a "community antenna" service.

[7] In a study examining the programming available on cable television systems in New York City between 1969 and 1997, Professor Eli Noam of Columbia University found that "public interest" programming on commercial television is both abundant and growing. Eli M. Noam, *Public Interest Programming By American Commercial Television*, in PUBLIC TELEVISION IN AMERICA, 145-176 (Eli M. Noam and Jens Waltermann, eds., 1998). He identified a significant number of cable television networks that provide what he considered to be public interest programming, including Court TV, A&E Television,

former FCC Chairman Newton Minow noted in a 1991 speech commemorating the 30th anniversary of his "vast wasteland" speech, "[i]f you are a sports fan, a news junkie, a stock-market follower, a rock-music devotee, a person who speaks Spanish, a nostalgic old-movie buff, a congressional-hearing observer, a weather watcher – you now have your own choice." Indeed, he noted that "[t]he FCC objective in the early 1960s to expand choice has been fulfilled – beyond all expectations."[8] As the Commission recently noted, "the vast majority of Americans enjoy more choice, more programming and more services than at any time in history." *2003 Video Competition Report*, 19 FCC Rcd. at 1608.

In the decade since the Commission first began compiling data for its video competition reports, the number of nationally delivered programming networks has steadily increased more than three-fold, from less than 100 in the first report to 339 in the 2003 report.[9] During this time, the level of vertical integration of programming

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Bravo, C-SPAN, CNN, CNBC, Disney, Discovery, The History Channel, The Fox News Channel, The Learning Channel, The Weather Channel, Mind Extension University and others, including regional news channels. He also identified several channels, such as Black Entertainment Television, that address the interests of ethnic minorities. In total, the number of channels found to provide "primarily public interest programming" was considered to be quite large, representing almost half of the available cable channels. Since that study, even more such channels have been launched, including National Geographic, History International, Discovery Civilization, Discovery Science, Discovery Kids, Biography, and others.

[8] Newton Minow, *How Vast the Wasteland Now?* Address at the Freedom Forum Media Studies Center, Columbia University, May 9, 1991.

[9] *See generally Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*), 9 FCC Rcd. 7442 (1994) ("*1994 Video Competition Report*"); 11 FCC Rcd. 2060 (1995); 12 FCC Rcd. 4358 (1997); 13 FCC Rcd. 1034 (1998); *1999 Video Competition Report*; *2000 Video Competition Report*; *2001 Video Competition Report*; *2002 Video Competition Report*; and *2003 Video Competition Report*.

services, as measured by the Commission, declined from 53 percent to 33 percent. *Compare 1994 Video Competition Report*, 9 FCC Rcd. at 7522, with *2003 Video Competition Report*, 19 FCC Rcd. at 1690-91. By any measure the variety of programming services and options available to the average subscriber has been greatly enhanced, both in quality and quantity.[10] And, as might be expected, viewers increasingly have embraced multichannel programming sources as an alternative to broadcast television.[11] The total number of subscribers to all multichannel video services reached 94.1 million households by mid-2003. *2003 Video Competition Report*, 19 FCC Rcd. at 1609.

Cable television and subsequent multichannel media developed as packaged programming services in which the mix of services was determined by the editorial judgment of the operator. However, recognizing that different subscribers are interested in varying levels of service, operators historically have offered programming tiers, including basic (typically twenty to twenty-five channels, including, at a minimum, local broadcast stations and leased and public access channels); expanded basic (typically thirty to forty channels, including special interest networks, such as

[10] Seventy-nine cable networks studied by GAO increased their expenditures for original programming from $6.47 billion in 1999 to $8.9 billion in 2002, an increase of 38 percent. The GAO found that cable networks were increasing the amount of original content and improving the quality of their programs to attract viewers as a result of increasing competition. GAO Report at 23-24.

[11] In the *1994 Video Competition Report*, the Commission found that the four broadcast networks (ABC, CBS, NBC and Fox) had 72 percent of the prime time audience during the 1993-94 season, while in the *2002 Video Competition Report*, all broadcast stations, including the top seven broadcast networks, had a combined prime time audience share of 58.9 percent (2001-02 season). *See 2002 Video Competition Report*, 17 FCC Rcd. at 26941. The prime time audience share for the top four broadcast networks was 45 percent in 2002.

Court TV, that were developed for the multichannel world of cable television); and premium (typically comprised of non-advertiser supported single or packaged offerings of channels such as Showtime or HBO that feature recently released theatrical films and other first-run products, such as original series and special event programming).[12] As technology advanced, operators provided additional choices, including digital programming tiers, pay-per-view programming, video-on-demand, subscription video-on-demand, and sports packages. This approach of providing bundles of video channels in various tiers of service was acknowledged by Congress and codified by law. Both the 1984 and 1992 Cable Acts operate on the assumption that cable operators have broad discretion to structure their various tiers of programming (other than the basic tier, which must include local broadcast signals and access channels).[13]

Where government has sought to regulate cable television, as in the 1992 Cable Act, rules were premised on the assumption that cable was the overwhelmingly dominant means of multichannel delivery. To whatever extent the assumption of dominance was justified twelve years ago, the video marketplace has evolved to a significant degree. The Commission has observed that "a decade ago, cable operators

[12] Recently, the GAO provided testimony that the average basic tier consists of twenty-five channels and the average expanded-basic tier contains an additional thirty-six channels. Statement of Mark L. Goldstein, Director, Physical Infrastructure Issues, General Accounting Office, Testimony before the Senate Committee on Commerce, Science, and Transportation (March 25, 2004) ("GAO Testimony").

[13] 47 U.S.C. §§ 543(b), 544(f)(1). *See Rate Regulation Report & Order*, 8 FCC Rcd. 5631, 5905-96 (1993) (rate regulations were not intended to reduce cable operators' discretion to decide which services to include in various tiers of service); *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995).

served almost 100% of the nation's MVPD subscribers; in 2003, cable operators served approximately 75% of all MVPD subscribers." It added that "[t]oday, most consumers may choose between over-the-air broadcast television, a cable service, and at least two DBS providers."[14] For the past several years, subscribership among competing multichannel providers has continued to increase, as cable's proportion of the market has declined. *2003 Video Competition Report*, 19 FCC Rcd. at 1682-83. During the past decade the number of households subscribing to cable television increased from 57.4 million to 68.8 million, while the number of subscribers to DBS rose from 40,000 to over 20 million.[15]

This trend is likely to continue, as competitors and technological advances provide additional alternatives. For example, one prominent television broadcaster is proposing a new type of MVPD to compete directly with the services provided by cable and DBS providers, by aggregating and packaging broadcasters' multicast channels (along with selected cable networks) in each market.[16] In addition, producers of digital

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[14] *Notice of Inquiry, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 04-136, ¶ 2 (released June 17, 2004) ("*2004 Video Competition NOI*").

[15] *Compare 1994 Video Competition Report*, 9 FCC Rcd. at 65, with *2003 Video Competition Report*, 19 FCC Rcd. at 1650.

[16] Ted Hearn, *Smulyan's Wireless Campaign: Emmis Chief Sees Stations Creating A 'Cable' Digital Multicast Option*, MULTICHANNEL NEWS, April 26, 2004.

video recorders are exploring ways to bypass traditional cable and satellite services using the Internet to delivery programming to consumers.[17]

In sum, consumers have more diverse content available to them and a greater ability to exercise their preferences with respect to particular programming than at any time in the past. As the Commission observed recently, "[o]verall, increased competition along with the development of advanced services now enable consumers to maintain more control over what, when, and how they receive information." *2004 Video Competition NOI* at ¶ 3. The purpose of this inquiry is to explore the implications of policies that might require cable networks and multichannel providers to provide additional service options, primarily in the form of "themed" (*e.g.*, "family-friendly") tiers and/or a la carte channel offerings. The Public Notice asks how the industry would be affected by such requirements, and about the legality of any such rules. These issues are examined below.

II. GOVERNMENT REGULATIONS AFFECTING HOW MULTICHANNEL PROGRAMMING MAY BE MARKETED WOULD DISRUPT ESTABLISHED BUSINESS MODELS AND DISSERVE CONSUMER INTERESTS

The question presented in this proceeding is whether consumers might be offered even greater choices than presently exist through the ability to purchase

[17] John Markoff, *New Service by TiVo Will Build Bridges from Internet to the TV*, NEW YORK TIMES, June 9, 2004; Richard Shim, *TiVo Steps into Online Content*, CNET NEWS.COM, June 9, 2004. Court TV itself has recently announced plans to distribute some content over the Internet, with a subscription broadband service that will allow users to view on the Internet live streams of court trials. Daisy Whitney, *Cabler Puts Trials Online*, TELEVISION WEEK, June 28, 2004.

channels on an à la carte basis, and whether such a policy may be enforced through regulation. Additionally, the Public Notice asks whether the government may require the offering of themed tiers or stand-alone programming services as a way to serve subscriber interests.

A. IMPORTANCE OF BUNDLING TO MULTICHANNEL VIDEO DELIVERY

Multichannel video service providers do not offer bundled tiers of channels simply because that is the way it was done in the past. Nor is the emergence of myriad diverse programming services a coincidence that occurred separately from the historic marketing practices of cable operators and other multichannel service providers. Rather, such diversity exists because of the industry's historic practice of providing programming in tiers. As explained below, regulating the way video channels may or must be offered on a multichannel platform would undermine the premises on which multichannel diversity was built, and it would not produce the consumer benefits expected by proponents of regulation. Any such regulations would disrupt an established business model, would seriously limit diversity, and would not lead to lower rates.

Multichannel video providers, such as cable operators, offer service that corresponds to the way in which most viewers watch television. When, as is often the case, a viewer has not selected a specific program in advance, he or she is likely to

"browse" or "surf" the channels until something interesting turns up.[18] Many viewers may not even be aware of the name of the channel on which they stop to take a closer look.[19] This is supported by market research showing that consumers often will not be aware of the name of a channel unless it appears before them, yet a substantial proportion of viewers will describe particular programs on the channel as being important to their overall enjoyment of cable as a service.[20] Consequently, multichannel video providers seek to provide value to their subscribers by making available a broad range of choices that includes niche channels that may be viewed infrequently. *See* GAO Testimony at 16 ("subscribers place value in having the opportunity to occasionally watch networks they typically do not watch").

The economic basis of the multichannel industry is predicated on these assumptions. Most established cable networks specify packaging requirements or tier

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[18] One recent study found that about half of all cable and satellite TV viewers frequently flip through channels until they find something to watch. Just over a third of the viewers frequently make a point of watching particular shows. Research Alert, *How TV Viewers View TV*, Cable and Telecommunications Association for Marketing (December 6, 2002). Nielsen Media Research asks the keepers of TV diaries to record their viewing habits in 15 minute increments. But actual users of the diaries indicate that the method fails to keep up with their "twitchy, channel-surfing habits." *See Confessions of a Nielsen Household – The Drawbacks of the Paper Diary Method for Recording Television Viewing*, AMERICAN DEMOGRAPHICS, May 1, 2001.

[19] For that reason, cable networks in the 1990s started placing their logos on screen to help provide brand awareness among viewers. Peter Hall, *Whither the Broadcast Logo?*, at http://www.aiga.org/content.cfm?CategoryID=103 (accessed July 13, 2004).

[20] In Court TV's case, for example, Q ratings between December 2000 and November 2003 showed unaided awareness of the network at only 3 to 6 percent among the respondents. At the same time, however, the same study revealed that Court TV has four programs (I, Detective; Forensic Files; Body of Evidence; and The System) in the top ten shows out of 168 ranked by positive Q ratings. Court TV Network Tracking Study, November 2003 – Wave 6.

placement in order to ensure the widest possible coverage.[21] All of the top forty to fifty cable networks require in their affiliation agreements that they must be carried either on the basic or expanded basic tier. GAO Report at 34. This is because the networks are supported by a mix of advertising revenue and affiliate fees, both of which depend on the degree of penetration and reach. The more subscribers who can view a given network, the more it earns in affiliate fees, and the more the network can charge for advertising. Of seventy-nine cable networks studied by the GAO, the proportion of revenue derived from these two sources was almost evenly split.[22] Any change that reduces the level of penetration necessarily reduces the amount a network can charge for advertising and places upward pressure on affiliate fees. Additionally, and for the same reason, the higher fees must be recovered from a dwindling subscriber base. GAO Testimony at 15-16.

In addition, economies of scale are realized by offering programming networks in broad service tiers. The advantages of bundling cable network offerings include lowering transaction costs and enhancing the value of the service for consumers, providing synergies for distributors and networks associated with selling advertising and promoting services, and enabling the launch of new and unique programming

[21] This usually is accomplished either by specifying the package or tier in the affiliation agreement or by stipulating what percentage of subscribers must be able to view the network.

[22] Between 1999 and 2002, the split between advertising and license fees was as follows: 1999 (advertising 55%/license fees 45%); 2000 (advertising 56%/license fees 44%); 2001 (advertising 51%/license fees 49%); 2002 (advertising 47%/license fees 53%). GAO Report at 35.

services.[23] Basic economic analysis confirms that the cost of service will necessarily increase if individual channels are sold in separate units.[24] The validity and value of the existing bundling approach for selling video programming is confirmed by the fact that bundling is used by virtually every entity which currently provides multichannel video programming, including DBS providers, C-Band satellite providers, and wireless cable providers.

For new and niche programmers, obtaining carriage of a video program service in a tier with other more established programming services can mean the difference between survival and failure. A new program service's placement on a cable service tier, especially in proximity to the channel numbers of the most widely watched programming, will help ensure that the service gets introduced to an audience, in much the same way as broadcast networks choose to place new programs in time slots adjacent to established programs. As the Economists Study explains, "[i]t is through that association that new services have the greatest opportunity to be sampled and hence to find an audience." Economists Study at 4. Stated another way, "[b]y aggregating the demands of viewers who differ in their willingness-to-pay for different services, bundling makes it possible to supply program services that could not be supported on a stand-alone basis." Owen & Wildman at 134. Indeed, the high failure

[23] *"How Bundling Cable Networks Benefits Consumers,"* Economists, Incorporated, July 23, 1998 ("Economists Study"), filed with Comments of ABC, Inc., CS Docket No. 98-102, July 31, 1998, at 2-5.

[24] *See* generally Bruce Owen and Stephen Wildman, VIDEO ECONOMICS, 219-20 (1992) ("Owen & Wildman").

rate among cable services that have been offered on an à la carte basis, and the trend of program services to migrate from à la carte to tiers (*e.g.*, Bravo and The Disney Channel), demonstrate the risks inherent in cable carriage without the benefit of bundling. Economists Study at 6.

Such considerations are not unique to the market for video programming. Indeed, bundling of goods is a commonplace occurrence in many different markets. Potentially distinct products are often bundled in order to lower transaction costs, benefit from economies of scale, and enhance the attractiveness or convenience of the product to consumers.[25] In the sale of newspapers, for example, the various sections and columns are bundled into a single product, even though few people read all parts of the paper. But a newspaper is sold as a bundled product because: (1) of the economies of having all sections delivered at once rather than having separate distribution mechanisms for each section; (2) of the value to subscribers of having the option to look at all of the sections, even if they do not read all sections every day; and (3) bundling makes advertising more valuable and efficient because advertisers prefer paying a single price to reach all of the newspaper's readers with a single advertisement, rather than placing an advertiser's separate ads in each newspaper section.[26]

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[25] *See* Economists Study.

[26] *See id*. at 1-2.

Critics of video tiering have proposed less favorable metaphors to suggest that bundling is an economically unnatural act that is bad for consumers. For example, one advocate of regulation out of concern for "indecent" content argues that bundling networks on MVPD tiers is "like a grocery store telling you that in order to buy a gallon of milk, you also have to buy a six-pack of beer and a carton of cigarettes."[27] Such an analogy is meaningless because it does not describe real world conditions. The "grocery store" metaphor is inapt for the simple reason that milk, beer, and cigarettes are never marketed in this way. Similarly, Senator McCain has suggested that tiered programming is akin to being forced to purchase all the magazines at a newsstand when the reader just wants one title. Yet again, magazines are not sold in this way, and the economic basis of the magazine industry is not predicated on bundled sales.[28] Such analogies are not relevant to a video programming market that naturally developed using the tiering concept, and that provides significant benefits to consumers.

[27] *PTC Promotes Benefits of À La Carte Cable Television Programming*, Press Release, May 5, 2004, at http://www.parentstv.org/ptc/publications/release/2004/0505.asp (accessed July 13, 2004).

[28] In the example of a magazine rack, customers have the opportunity to browse through multiple titles and find different products in a single location, but patrons realize no discount from buying multiple magazines, they don't have the ability to sample other magazines in their home after leaving the store, and advertisers cannot purchase space in a single magazine based on the readership of all magazines. The magazine stand analogy would have more relevance if a customer could purchase all of the magazines on the newsstand for the same price that it pays for only a handful.

B. IMPORTANCE OF BUNDLING AND TIERING TO COURT TV

This year, Court TV for the first time joined the coveted 80 million Nielsen subscriber club.[29] This level of penetration was reached only after years of hard work in a highly competitive marketplace, and was possible because of the prevailing business model for the delivery of multichannel video services. If not for the bundled manner in which its programming is sold, it is unlikely that Court TV would ever have developed into the compelling programming service it has become, and it is quite possible that a distinctive voice in the media landscape would have been lost. Court TV is the first and only cable network dedicated to the full panoply of the criminal justice system, the investigative process, and justice. It features a daytime schedule rich with live trials, legal commentary, news on law-related topics, and programming concerning crime and its impact on society, as well as a diverse prime-time schedule of original movies, documentaries, series, and specials, plus award winning educational and public service programs.

Court TV commenced operations in 1991 seeking carriage on cable systems' "expanded basic" service tiers, hoping to gain carriage on the most widely distributed service level of as many cable systems as possible. By the end of 1993, when Nielsen first included Court TV in its reporting, Court TV had about 14 million subscribers and

[29] Nielsen Home Video Index, February 2004.

was available in approximately 23 percent of cable households.[30] At this point in Court TV's development, obtaining carriage became more difficult, in part because of the dampening effect of cable rate regulation in the mid-1990s[31] as well as the limited channel capacity of most cable systems and intense competition among cable networks. During this early period, Court TV's advertising revenues were limited not only by the size of the viewing audience but also by its limited audience reach. Advertising was limited to direct response advertising rather than national accounts before the network achieved widespread carriage.

In 1997 and 1998, a change in Court TV's distribution approach with MVPDs provided significant gains. At that time, Court TV began supplying cable operators

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[30] Nielsen Media Research, Universe Estimates, Dec. 1993.

[31] Rate regulations adopted pursuant to the Cable Act of 1992 had significant adverse effects on the development and launch of new programming services. *See* Thomas W. Hazlett, *Prices and Outputs Under Cable TV Reregulation*, 12 J. OF REGULATORY ECON. 173 (1997) (The growth rate of basic cable television subscribership fell sharply during the period of rate reductions. Only after rate controls were relaxed in response to concerns about their impact on programming networks did industry output measures return to the pre-regulation growth trends). Recognizing that its initial rate regulations created an artificial bottleneck that stalled new launches and stifled existing services, the Commission adopted a series of modifications to those rules to provide greater economic incentives for cable operators to add channels, including "going-forward" rules and "new product tiers," designed to "provide additional incentives for operators to provide new services to consumers because operators will be permitted to price these tiers as they choose." *Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd. 1226, 1231 (1995). The FCC also waived the rules to permit cable operators to pass through immediately the launch costs for one new service where the rules would have otherwise required a waiting period before those costs could have been recovered by cable operators. *E.g., Letter to Robert Corn-Revere from Alexandra M. Wilson* (released April 19, 1994). The Commission's rate regulations eventually were allowed to lapse. *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 5296 (1999).

with "launch support" as a further incentive for them to launch and carry the channel.[32] Although potentially costly, Court TV determined that it was necessary to offer such support in order to compete with the incentives that other basic advertising-supported cable networks were providing to MVPDs. This move proved effective and, according to Nielsen reports, Court TV's subscribers grew from 27.6 million subscribers at the end of 1996 to 34.3 million by year-end 1998.[33] At that time, national ad revenues constituted 14 percent of total ad sales revenues and total ad sales revenues constituted only 24 percent of Court TV's total revenues.

New management came to Court TV in late 1998, making a further effort to ramp up distribution and ad sales through a heightened commitment to provide original and compelling programming. Additionally, many of Court TV's affiliation agreements were renegotiated at that time as long-term deals with significant launch support and free carriage incentives. Over the past five years, Court TV offered various significant financial inducements (including payments for carriage, launch/marketing support and free carriage periods) to gain access to MVPD platforms. Largely as a result of such incentives, the number of Court TV's subscribers more than doubled during that time

[32] "Launch support" refers to funding provided to cable operators to defray the costs associated with launching and marketing a new programming service, including such costs as notifying subscribers about the new channel, changing channel lineup cards, and providing training for the operator's customer service representatives.

[33] Nielsen Media Research, Universe Estimates, Dec. 1996 and Dec. 1998, respectively.

period, growing from 34 million to 79 million.[34] These financial arrangements and significant advances in penetration were possible only because Court TV was offered to distributors as a network positioned to be part of a broad programming package. Court TV's affiliation agreements generally provided that, in exchange for the launch support and free carriage, MVPDs would carry the channel as part of their basic or expanded basic analog package without the right to drop Court TV or relocate it elsewhere on a system's lineup. In the event a distributor chose to move Court TV to a less penetrated tier, provisions generally required increased license fees and/or other economic penalties intended to repay Court TV for the value of the economic incentives that it had already paid. In addition, throughout Court TV's history, it has not permitted distributors to offer or carry the network on an à la carte or "stand alone" basis precisely because its business model would not be viable without the broad distribution that expanded basic carriage offers.

Largely as a result of the expanded carriage resulting from these marketing initiatives, in the past five years Court TV has significantly expanded its commitment to original programming and has become a leader in forensic and investigative programming. The network has spent hundreds of millions of dollars to develop programming in order to attract viewers and garner carriage, and it has recently announced a $200 million commitment to compelling programming over the next two

[34] Nielsen Media Research, Universe Estimates, Dec. 1998 and Dec. 2003, respectively.

years.[35] Trial coverage, with expert analysis, is the cornerstone of Court TV's daytime programming, delivering a compelling, real-life look at the legal system by focusing on newsworthy and controversial legal proceedings. Prime-time is dedicated to investigation with a diverse schedule of original movies and documentaries on crucial social and judicial issues, plus series and specials.[36]

Court TV has also invested heavily in its infrastructure and technical equipment in order to maintain a state-of-the-art operations center and live studios for its programming. The anchors for Court TV's daytime programming have been selected

[35] *Court TV-The Investigation Channel™ Adds New Investigation and Reality Programs to Innovative Original Programming Slate For 2004-5 Season*, Press Release (March 29, 2004).

[36] Recent significant and high-profile trials which Court TV has telecast include the acquittal in Texas of Robert Durst on charges of murdering a friend, and the full trial of former NBA star Jayson Williams' manslaughter case. Additional court cases which are being reported on by Court TV include the Kobe Bryant sexual assault charges, the arrest of Michael Jackson on child molestation charges, the case against Scott Peterson for the murder of his wife, Laci, and the murder charges against well known rock music impresario Robert Blake. Court TV presents an ongoing series entitled Forensic Files, which opens the world of forensic science to the viewing audience, and Court TV has recently presented revealing documentaries such as Al Roker Investigates: The Farmingville Incident (the investigation of a hate crime on Long Island); Extreme Evidence, a series using forensics to explain how otherwise unexplainable events have occurred; Psychic Detectives, hosted by Andrea Thompson (discussing how detectives and psychics work to solve difficult cases); and The Court TV Safety Challenge, a series of programs designed to educate its audience on the dangers that may be found in everyday situations and what can be done to avoid them, e.g., Traveling Safe, hosted by Cynthia McFadden. Recent original films include Guilt by Association, starring Academy Award winning actress Mercedes Ruehl (dramatizing the issue of mandatory minimum drug sentencing through the story of a woman unjustly imprisoned); The Interrogation of Michael Crowe, with Ally Sheedy as Cheryl Crowe, the mother who fought to prove her son's innocence after he was accused of, and confessed to, murdering his sister following hours of police interrogation; and Chasing Freedom, starring Juliet Lewis, which examined the plight of a Muslim woman seeking asylum and the difficulties she was forced to overcome. Court TV's extensive public affairs and educational efforts have been well-received and awarded the cable industry's highest honors for public affairs programming. In a national survey of high school teachers by Malarkey-Taylor Associates, when asked about Court TV's importance and educational value, teachers noted how the network allows students to see the justice system in action, helps them understand many aspects of the law, constructively presents current issues of social interest, and focuses on justice being served. According to Cable in the Classroom, teachers rate Court TV as one of the best sources of educational programming out of the television and cable networks available in schools.

for their impressive, diverse backgrounds, in order to create an authority and authenticity essential to the Court TV format.[37] Programming of this nature and value to subscribers would likely never have developed in the absence of the widespread carriage that Court TV has today, due largely to its distribution strategy of using an incentive system to gain carriage on cable systems' most widely viewed tiers. As discussed below, this type of programming is unlikely to be provided in the future, if indeed Court TV survives at all, if carriage must be offered on an à la carte basis.

C. REQUIRING À LA CARTE CHANNEL OFFERINGS WOULD HAVE SIGNIFICANT ADVERSE CONSEQUENCES FOR THE MULTICHANNEL VIDEO INDUSTRY

As the discussion above suggests, any requirement to sell cable programming on an à la carte basis would dramatically change the economic model on which most cable networks developed. The effect would be a radical restructuring of the industry that would devastate all programming services, particularly niche programming services like Court TV, and would reduce consumer choice.

[37] This unique group includes duPont-Columbia Award-winning journalist Fred Graham; former Texas District Court judge Catherine Crier, who has also won the prestigious duPont-Columbia Award as well as the Gracie Allen Award; renowned civil rights attorney Lisa Bloom; former San Francisco ADA Kimberly Guilfoyle Newsom; AP Award-winning reporter Vinnie Politan; former Atlanta Special Prosecutor Nancy Grace; veteran investigative journalist Diane Dimond, awarded the ABA's Silver Gavel Award; and former prosecutor for the Riverside County District Attorney's office James Curtis, founder of The Justice Project Incorporated.

1. Economic Analyses Do Not Support the À La Carte Proposals

Forecasting the impact of any à la carte or tiering requirement is necessarily a predictive exercise, since implementing such measures would alter the business model for the multichannel video industry. The GAO identified a number of factors that it said make it "difficult to ascertain how many consumers would be made better off and how many would be made worse off under an à la carte approach." GAO Testimony at 16. These include how cable operators would price à la carte channels, consumer purchasing patterns, consumer valuations of à la carte channels, whether niche networks would "cease to exist," and if so, how many would fail. *Id*. The GAO was narrowly focused on whether à la carte requirements would lead to lower rates – and still was unable to come to a definitive answer – but its findings suggest a broader conclusion: consumer welfare would not be improved by an à la carte mandate.

Certain effects of any à la carte rule are not hard to predict. It is undeniable that any regulatory intervention requiring à la carte or themed tier carriage would effectively abrogate long-standing contractual arrangements and override carefully negotiated tier placement provisions, thus depriving those networks of contractual benefits they bargained for and reasonably expected to receive. The economic basis of such agreements is intertwined with their carriage and packaging provisions, which are essential terms in any affiliation agreement. Launch support and/or free carriage terms offered in long-term agreements are implicitly or explicitly conditioned on long-term

carriage commitments in broadly distributed packages in order to grow ad sales revenues and subscriber numbers for future affiliate license fees. To change such arrangements by legislative fiat would undo the premises upon which most other economic assumptions regarding carriage are based. As the FCC noted, "an à la carte system might provide greater consumer choice, [but] it would impose additional costs on subscribers and alter the current economic structure of the cable industry."[38]

Other obvious effects of any à la carte requirement would be the technical upgrades that would be required to make individual channel selections. Subscribers must have an addressable converter for each television attached to the cable system to unscramble the signals of the channels subscribers decide to purchase. Many homes currently lack such boxes, and the GAO estimates that the average monthly rental charge for an addressable converter is $4.39.[39] For homes that have multiple television sets, it predicted that the cost for the additional converter boxes would be "about $13.17 a month at current prices." GAO Report at 32.

Not only would equipment costs rise in an à la carte environment, but other costs would increase as well and would put upward pressure on licensing fees. Cable operators would incur additional costs to monitor and manage à la carte selections, due to the need for additional customer service and technical staff to deal with the increased

[38] *See* 2002 Video Competition NOI.

[39] Although the penetration of addressable converters varies among cable operators, one operator cited by the GAO reported that only about 40 percent of its subscribers currently have such boxes. GAO Report at 33.

number of transactions and the increased length of telephone calls to the cable system. *Id*. at 33. Moreover, cable operators would likely need an entirely new consumer billing system to handle the changes in packaging and distribution of the programming services.

Additionally, the marketing strategies and attendant costs for a stand-alone network are substantially different from the approaches Court TV and other non-premium cable programmers have followed. For example, an à la carte channel such as HBO uses advertising and marketing strategies focusing on consumer awareness so that subscribers know enough about a network to make the affirmative purchasing decision to select and pay for it on a monthly basis. It must then heavily advertise its individual program offerings ("tune-in" advertising) to retain its subscriber base and garner ratings. The monthly "churn" in the premium business is well known and premium services experience high transaction costs of retaining, terminating, and replacing customers each month. As a consequence, stand-alone channels generally have far lower penetration among cable subscribers than do tiered networks.[40]

The general upshot of these factors is that new and niche programming services that grew up under cable's prevailing business model would be stillborn in an à la carte environment. The GAO Report noted that cable operators and financial analysts agreed "smaller networks or those providing specialty programming would be hurt the most

[40] Even HBO, the leading premium service, which has been sold as a stand-alone network for its entire 30 year existence, is viewed in only about 27 million homes. MULTICHANNEL NEWS, June 9, 2003.

by an à la carte system." GAO Report at 36. These networks focus on particular demographics or interests with programming that may not have broad appeal. This includes gender-targeted programming that by design expects to forego approximately half the viewing audience, programming for children that make up only about 25 percent of viewers,[41] programming in foreign languages or otherwise targeted to serve minority viewers, and arts and religious programming. Many such networks already have relatively small audiences. The loss of even a small portion of these subscribers – particularly those able to "sample" and discover the network – due to a transition to à la carte could be fatal. *See* GAO Testimony at 16 ("programming diversity would suffer under an à la carte system because some cable networks, especially small and independent networks, would not be able to gain enough subscribers to support the network"). Though some of the most popular networks may be able to survive by raising prices, it would not be feasible for most to continue as advertiser-supported networks or exist as a subscription "premium" service, and they thus are likely to go dark, further reducing the diversity of programming available to consumers.

[41] U.S. Census Bureau, Statistical Abstract of the United States, http://www.census.gov/prod/2004pubs/03statab/pop.pdf, Table 13 (accessed July 13, 2004). It is notable that the ability of MVPDs to support niche networks in the current bundling environment allows them to offer what Commissioner Martin calls "family-friendly" programming to an extent that may not be possible on broadcast channels, which must concentrate most of their efforts on programs of mass appeal. *See* Kevin J. Martin, *Family-Friendly Programming: Providing More Tools for Parents*, 55 FED. COM. L. J., 553, 556-57 (May 2003) ("*Family Friendly Programming*") (Commissioner Martin article noting that "primetime viewing options as a family" on broadcast "may be few and shrinking" while "cable and satellite … offer" a wealth of family fare that is "great programming").

Diversity would further suffer as the ability to launch new networks would all but disappear. As the Economists Study noted, "[i]n many respects, bundling enables the launch of new and previously unsampled services" that "benefit greatly from their association on the bundled tier with established networks," as it gives "new services … the greatest opportunity to be sampled and … find an audience." Economists Study at 4. In this regard, since new networks do not already have viewers, or ratings that go with them, the key asset they have to encourage investment is not the viewers themselves, but the *potential* to reach them that meaningful subscriber penetration promises.

The ultimate result for consumers would be reduced choice overall and an à la carte option that costs more to exercise. As the Commission noted in the *2003 Video Competition Report*, 19 FCC Rcd. at 1705, "[b]undling programming channels into packages allows greater penetration of individual channels which lowers the per subscriber price MVPDs pay to programmers . . ." Conversely, as à la carte distribution leads to higher license fees that would be passed on to consumers, the GAO observed "it appears that subscribers' monthly cable bills would not necessarily decline under an à la carte system." GAO Report at 36. The Report noted that "one cable network … estimated that to compensate for the loss of advertising revenue in an à la carte scenario, [it] would have to raise its monthly license fee from the current … rate of $0.25 per subscriber to a level several fold higher – possibly as much as a few dollars per subscriber per month," *i.e.*, an approximately *tenfold* increase. *Id*. Under these

conditions, for a consumer to experience a significant price reduction, he or she would have to subscribe to far fewer channels than at present.[42]

2. Changing the Rules to Require À La Carte Channel Offerings Would Offer No Viable Business Model For Networks Such As Court TV

Court TV has analyzed what effect an à la carte carriage requirement would have on its business plan. Such a requirement would undo the economic assumptions on which Court TV's business plans since its inception have been based and would put the channel out of business. The analysis of the effects of such a change, although inherently predictive, reaches a conclusion that is consistent with the earlier findings of both the FCC and the GAO as applied to the multichannel video industry as a whole. An à la carte carriage obligation would impose substantial changes on Court TV's marketing efforts, its ability to produce original programming, its ad revenues and affiliate license fees, its profitability, and ultimately its likelihood of survival.

Court TV primarily markets the network through cross-channel awareness and tune-in promotion on expanded basic cable networks. It does not need to market to consumers to urge them to *purchase* the Court TV service; it primarily markets to MVPDs since consumers are already receiving Court TV if they subscribe to the most

[42] In its 2002 analysis of cable rates, the FCC reported the average MVPD monthly bill is $36.47 for 62.7 channels, or $0.664 per channel. *2002 Cable Pricing Report*, 18 FCC Rcd. 13284, Att. 2 (2003). Assuming even an average à la carte per-channel price as low as $1.50, subscribers would have to forego approximately two thirds of the channels they currently receive to experience even a ten percent savings. And that ten percent savings does not include the cost of the digital box required to receive à la carte service.

widely distributed programming package, *i.e.*, expanded basic. If required to revamp its marketing strategy to survive in an à la carte environment, Court TV estimates it would have to devote millions of dollars to rebranding and remarketing its service, in an environment where all other basic cable networks are making a similar effort. Moreover, this would need to be budgeted as a continuing expenditure, since customers in an à la carte environment repeat their buying decision every month by deciding whether to continue to pay for the service or to drop it. In this scenario, many of the millions of dollars that Court TV now spends to develop original programming would have to be redirected for marketing purposes simply to survive. Rather than continuing to invest in original programming, the foreseeable future would be devoted to treading water in the television market and creating a new brand identity.

Additionally, Court TV's revenue streams from both advertising and licensing fees would be adversely affected in an à la carte environment. License fees are expected to decrease due to a dramatic loss of subscribers, and advertising revenues would experience a significant reduction since rates are directly tied to ratings, subscriber reach, and demographics. Unlike in 1998, when total ad sales revenues constituted only 24% of Court TV's total revenues, in 2003, total ad sales revenues constituted 68% of Court TV's total revenues, and national ad revenues constituted 50% of total ad sales revenues (rather than 14% in 1998).[43] In Court TV's experience, national ad buys are

[43] Nielsen Media Research, Universe Estimates, Dec. 2003 and Dec. 1998, respectively.

generally not made on networks with fewer than twenty to thirty million subscribers. Based on a modeling analysis that Court TV has conducted, if Court TV were to offer its service to subscribers on an à la carte basis at even $1.00 per month, Court TV's license fee revenues could be expected to drop by up to 30 percent and advertising revenues could collapse to only 12 percent of their expected 2005 levels, destroying any financial viability and making the network's continued operation impossible.[44]

However, even this scenario is highly optimistic, based on available market research. According to information provided to Court TV, only 18 percent of cable subscribers would be willing to pay a per channel fee of $1 dollar or more for a basic network. The amount that an average cable subscriber would pay for Court TV on an à la carte basis is only 38¢ per month.[45] Such findings obscure the value that subscribers place on having a broad range of diverse programming options available to them, and suggest that a government mandate for à la carte network availability would have unforeseen consequences on the programming market.

Court TV estimates that in a pure à la carte environment it would have to charge customers at least $5.00 per month and maintain at least 85 percent of its current expanded basic carriage in order to remain profitable. Such a price is wholly

[44] *See* Declaration of Debra D'Arinzo, Court TV's Senior Director of Strategy and Planning, attached hereto ("D'Arinzo Declaration").

[45] Among Court TV's current viewers, that figure increases to only $1.27 per month. Beta Research Corp. 2003 Cable Subscriber Study ("Beta Study") The Beta Study is a widely used resource among cable operators. The results are based on 1,007 interviews conducted between August 18 and September 13, 2003, with adult cable subscribers in 25 cable systems across the country.

unrealistic, however, since it is expected that only about 0.3 percent of cable subscribers would purchase Court TV at this price.[46] Even assuming MVPDs offer all channels on an à la carte basis in addition to the current programming options, there is currently no way to predict how many subscribers would abandon current tiers and move to à la carte channel purchases.[47] If all bundling of program services is eliminated through a government mandate, based on Court TV's modeling analysis, it would be virtually impossible for the vast majority of advertising supported cable networks to survive. As noted below, the limited experience to date with à la carte, such as in Canada, suggests that most subscribers would continue to purchase and retain their existing tiers. But this assumes that government would not intervene to make sure that the à la carte option gives consumers a "realistic" choice by reimposing rate regulation. Unfortunately, such assumptions may not be warranted in light of past experience with cable rate controls.[48]

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[46] *See* D'Arinzo Declaration.

[47] *See id*. In any à la carte environment that may be adopted, it is extremely difficult to predict the variables that would affect the viability of networks such as Court TV. For example, if an à la carte regime is required in addition to expanded basic packages, it is unknown what impact this requirement would have on license fees for networks in the expanded basic package. Presumably, there would be a downward pressure on existing license fees as more networks vie for expanded basic carriage. Moreover, networks may offer free carriage to MSO's for expanded basic carriage just to ensure that their service will continue to be carried as part of that package.

[48] *See Adelphia Communications Corp. v. FCC*, 88 F.3d 1250 (D.C. Cir. 1996) (à la carte "tiers" eliminated as an "evasion" of cable rate regulation).

3. Experience With À La Carte Channel Offerings Fails to Support Proposals for New Regulation

The limited degree of interest in purchasing cable services à la carte is demonstrated by the experience on Canadian cable systems, where digital cable subscribers have the opportunity to purchase a number of new digital cable networks on an à la carte basis. Although, the à la carte option exists in Canada because of some of the peculiarities of that market, as discussed below, its existence does not support a conclusion that this alternative would have developed on its own, or that it would support the existing multichannel video business model.

Experience to date shows that à la carte carriage is hardly a popular option among Canadian cable subscribers. In actuality, the system is a combination of tiering and an à la carte option. Under a system used by Rogers Cable, subscribers who purchase a 30 channel basic tier for $24.00 and who also pay to lease a digital converter box for $8.95 can then purchase certain cable networks on an à la carte basis for $2.49 each.[49] Alternatively, Canadian subscribers can purchase a "theme pack" containing six to ten new digital channels for $6.95 or can create their own new digital "5-pack" for $9.95, "10-pack" for $14.95, "15-pack" for $18.75 and so forth. Similar pricing arrangements are offered by other Canadian distributors. The pricing system and the availability of these bundled alternatives make à la carte a very unpopular option. According to a Rogers official, "although à la carte is widely available, very few actually

[49] These figures are all in Canadian dollars.

buy one or two channels à la carte - so few, in fact, that the company doesn't even keep track of the number."[50]

Court TV's experience in Canada shows the same phenomenon. Court TV provides programming in Canada through "Court TV Canada," a channel majority owned by Chum Television and unrelated to Court TV, but to which Court TV licenses the right to carry its daytime programming. Since Court TV Canada is not included in the mandatory basic analog package, it can only be purchased as part of a smaller digital package or as a stand-alone service (in either case, through a digital converter box). Of those subscribers who receive the "Court TV Canada" service, only 0.74 percent avail themselves of the opportunity to purchase the channel à la carte. At this minimal purchase rate for the à la carte channel, it is hardly surprising that Court TV Canada has not earned a profit. Were Court TV offered solely on a strictly mandated à la carte model, there would be no prospect for continuation of the service let alone achievement of break even. These results confirm that even where à la carte is available, very few subscribers are interested in receiving programming in this manner.

It is also relevant that Canadian cable regulation is a highly regulated system which restricts the importation of cable programming from the United States for the express purpose of "giv[ing] priority to the carriage of Canadian programming services" and "ensur[ing] that a majority of the video channels . . . received by a

[50] Ted Hearn, *A La Carte Lives, Up North*, MULTICHANNEL NEWS, June 14, 2004.

subscriber are devoted to the distribution of Canadian programming services."[51] As enforced by the Canadian Radio-Television and Telecommunications Commission ("CRTC"), Canadian cable law differs from ours in many fundamental respects, including licensing of cable networks, basic rate regulation, establishing minimum wholesale rates to be paid to networks, requiring carriage of not only broadcast stations but also all Canadian specialty and pay television services appropriate for their markets, such as those in the predominant official language of that market.[52]

In addition, the CRTC enforces "linkage rules" which are designed to ensure the maximum exposure of Canadian cable channels. These rules severely limit the packaging and sale of programming services from the United States, such as by prohibiting a cable operator from offering a U.S.-based service on basic cable, if a comparable Canadian service already exists, and requiring any tier that includes U.S.-based cable programming also to include Canadian cable programming. *See* CRTC Fact Sheet.

Moreover, cable service in Canada is a secondary market, and certain services can be made available only because the larger U.S. market exists.[53] Due to the market's

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[51] Broadcasting Act, ch. 11, § 3(1)(t)(i), 1991 S.C. 117, 123 (Can.); Broadcasting Distribution Regulations, SOR/97-555, § 6(2), 131 C. Gaz. pt. II, at 3541, 3550 (Dec. 12, 1997).

[52] *See* Fact Sheet, Canadian Radio-Television and Telecommunications Commission, Distribution of Cable TV Services in Canada, Oct. 2, 2001, at http://www.crtc.gc.ca/ENG/INFO_SHT/CDBT4.HTM (accessed July 13, 2004) ("CRTC Fact Sheet").

[53] The Canadian à la carte system exists only due to the relatively small size of the Canadian cable market (7.2 million subscribers) as compared with the U.S. cable market (65.9 million subscribers).

relatively small size, Court TV and other U.S. cable networks devote little or no effort to market their services à la carte in Canada and à la carte carriage, even if widespread, would have a minimal effect on license fees and advertising revenues. Accordingly, even if à la carte were a popular option among Canadian cable subscribers, its existence in Canada provides no basis for adopting a similar requirement in the United States.[54]

III. À LA CARTE REQUIREMENTS AND TIERING REGULATIONS WOULD VIOLATE THE FIRST AMENDMENT

The Public Notice asked commenters to address the legal and constitutional implications of the à la carte issue and possible regulation of programming tiers. In doing so, it is largely calling for speculation, since no specific proposals currently are pending.[55] Although some questions in the Public Notice are couched in terms of service providers offering à la carte and tiering options "voluntarily," that description cannot be taken literally, since the question assumes there would be some form of

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Thus, à la carte carriage, even if widespread in Canada, would have a minimal affect on license fees and advertising revenues overall.

[54] The irony that U.S. policymakers may look to the Canadian system for guidance was noted in a recent speech by the President of the Canadian Cable Television Association, who observed, "Canadians are very envious of the choice and diversity available to American consumers - so much so we have to restrict the importation of your services to make sure that we can generate an audience for Canadian TV." *Canadian Cable TV Association Head Pans A La Carte Programming Model*, TR DAILY, June 30, 2004.

[55] However, the Public Notice is in part a response to Congressman Nathan Deal's introduction of the Video Programming Choice and Decency Act of 2004, which was offered as an amendment to the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("Deal Amendment"). *See* http://www.house.gov/deal/press/pr-alcarte-programming.shtml (accessed July 13, 2004). Congressman Deal later withdrew the amendment, ostensibly to facilitate issuance of the House Letter which, in part, spurred initiation of the instant proceeding. *Commerce Committee Leaders Request À La Carte Feasibility Study*, SATELLITE WEEK, May 24, 2004.

legislative or regulatory action.[56] For example, the Deal Amendment was directed toward permitting video providers to "voluntarily" offer programming to their subscribers on an à la carte basis, but the arrangement would not be voluntary for affected networks. Section 209(b) of the Deal Amendment would have authorized FCC rules that "prohibit any MVPD from entering into any contract with any video programming producer, or from complying with any provision of any such contract, that would preclude the MVPD from voluntarily offering à la carte programming to [its] subscribers."[57]

It is possible to envision a wide range of policy proposals that could emerge from an inquiry such as this, from a measure requiring all channels to be available à la carte to one guaranteeing complete editorial discretion. However, even the proposal described in the Public Notice as a "voluntary" à la carte plan would disrupt the basis on which most affiliation agreements were negotiated and would abrogate existing contracts. Such a measure inherently implicates First Amendment issues because "liberty of circulation" is constitutionally protected. *E.g.*, *Rossignol v. Voorhaar*, 316 F.3d

[56] The Public Notice recites, for example, that the "request for comment is intended to assist in gathering information … to respond to specific requests from … Congress for a Report on this issue." Public Notice at 1 (citing Letter from Congressmen Barton, Dingell, Upton, Markey, and Deal, Committee on Energy and Commerce, to Michael K. Powell, Chairman, Federal Communications Commission, May 18, 2004 ("House Letter"); Letter from Senator McCain, Chairman, Committee on Commerce, Science and Transportation to Chairman Powell, May 19, 2004) ("McCain Letter").

[57] Video Programming Choice and Decency Act of 2004, § 209(b). Additionally, Section 209(d) would authorize the FCC to suspend the enforcement of affiliation agreements for at least 12 months of any contract provision that "would preclude the MVPD from voluntarily offering à la carte programming to [its] subscribers."

516, 522 (4th Cir. 2003). Legislative measures that would undermine programmers' contractual guarantees to reach as many subscribers as possible would be particularly problematic because "without the circulation, the publication would be of little value." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Such constitutional concerns are not lessened by the fact that the restrictions primarily affect the profitability of network distribution. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 n.5 (1986).

Nor do the descriptions of some à la carte proposals as "voluntary" eliminate state action from any First Amendment analysis. The fact that (at least in some proposals) networks may be offered to subscribers à la carte only at the multichannel provider's option does not render such proposals a matter of private action and immune from constitutional review, as the Supreme Court explained in *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). The law at issue in that case permitted – but did not require – cable operators to develop private editorial policies to control indecent speech on leased access channels. The court of appeals had held that the voluntary measure was not unconstitutional because it relied on private editorial choices and not state action. *Alliance for Community Media v. FCC*, 56 F.3d 105, 149-159 (D.C. Cir. 1995) (*en banc*). But the Supreme Court in a single sentence brushed aside the circuit court's extended discussion of state action. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 737 ("Although the court said that it found no 'state action,' it could not have meant that phrase literally, for, of course, petitioners attack (as

'abridging . . . speech') a congressional statute – which, by definition, is an Act of 'Congress.'"). The Court then struck down most of the regulations at issue.

The relevant question is not *whether* an à la carte proposal would raise First Amendment issues. Rather, the important questions center on what level of scrutiny should be applied in any constitutional analysis, and whether the government has met its burden of proof. As explained below, any regulatory proposal that would require cable networks to be available on an à la carte basis is likely to fail constitutional review under either strict or intermediate scrutiny, even if it is characterized as "voluntary" à la carte.

A. CONTENT-BASED À LA CARTE REQUIREMENTS ARE INVALID UNDER STRICT FIRST AMENDMENT SCRUTINY

The Supreme Court has made clear that cable regulations that are predicated on government antipathy for particular speech or given speakers must be analyzed under strict First Amendment scrutiny. *Ashcroft v. ACLU*, No. 03-218, slip op. at 2 (U.S. June 29, 2004) ("the Constitution demands that content-based restrictions on speech be presumed invalid"); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 801, 813 (2000). This is true even when government regulations are "a subtle means of exercising a content preference." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994) ("*Turner I*"). The Court has long recognized that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Id. See also United States v. Eichman*, 496 U.S. 310, 315 (1990)

(facially neutral law is considered content-based when "the Government's asserted *interest* is related to the suppression of free expression") (emphasis in original). In such cases, it is the government's burden to prove that the regulation is necessary to serve a compelling interest and that no less restrictive alternatives exist.[58]

Although à la carte requirements have been advocated in the past as a form of rate regulation, more recent proposals are predicated on a desire to control programming content. Congressman Deal introduced the Video Programming Choice and Decency Act of 2004 as an "attempt," in part, "to deal with … indecency in television,"[59] and advocacy groups interested in restricting programming they find objectionable, like Parents Television Council ("PTC") and Concerned Women for America ("CWA"), have lobbied the FCC and Congress for measures to promote consumer purchases of video programming on an à la carte basis.[60] In addition, Commissioner Kevin Martin has advocated creation of "family-friendly" tiers on

[58] *Ashcroft*, slip op. at 7; *Playboy*, 529 U.S. at 813. Even if the rules are defended on purely economic terms, various cases apply strict scrutiny to regulations that impose a discriminatory economic burden on speakers. *See Simon and Schuster v. Crime Victims Bd.*, 502 U.S. 105 (1991); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988). *Compare Time Warner*, 56 F.3d at 183. *See Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 589 (content discrimination "is not the *sine qua non* of a violation of the First Amendment"). In this case, since à la carte requirements would be imposed on programmers, who are not licenses by the FCC or subject to local franchise requirements, any regulations would be particularly subject to First Amendment scrutiny.

[59] *See* http://www.house.gov/deal/press/pr-alcarte-programming.shtml (accessed July 13, 2004).

[60] Letter from Brent Bozell, President, PTC, to Senator John McCain, Concerning Cable Indecency, March 4, 2004; Martha Kleder, Policy Analyst, CWA, *The Case for À La Carte Cable Pricing*, Apr. 7, 2004.

multichannel systems.[61] Adopting tiering or à la carte requirements for any of these reasons obviously would be content-based.[62]

Indeed, a forced à la carte regime designed to enable consumers to avoid unwanted multichannel programming, whether for economic or editorial reasons, would be comparable to the cable signal bleed regulations struck down in *Playboy*. That case addressed the unwanted cable content that entered a subscriber's home as an adjunct to the service they elected to take. The law at issue required cable operators to solve the problem by taking special steps, including restricting the programming available to subscribers. The government argued that the regulation was permissible because the government was not targeting the speech based on its content, but was only enforcing subscriber preferences and thereby protecting children. It compared the rules to content zoning regulations targeted to secondary effects, but the Supreme Court rejected that reasoning and applied strict scrutiny. It did so because the government's interest focused on the content of programming, just as it does here. *Playboy*, 529 U.S. at 814-815.

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[61] Written Statement of Kevin J. Martin, Commissioner, FCC, in Protecting Children From Violent and Indecent Programming: Hearing Before the Senate Comm. on Commerce, Science and Transp., 108th Cong. (Feb. 11, 2004) ("Martin Statement"); *Family Friendly Programming*.

[62] That the government may also advance economic motives for requiring programmers to offer à la carte programming does not preclude the application of strict scrutiny. For example, in cases of zoning ordinances affecting speech, restrictions that are designed to curb "secondary effects" are not subject to strict scrutiny. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). However, "the lesser scrutiny afforded regulations targeting … secondary effects … has no application to content-based regulations targeting the primary effects of protected speech." *Playboy*, 529 U.S. at 815. *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 573-74 (2001).

This conclusion is even more germane to efforts to impose tiering requirements in the name of promoting "family-friendly" programming. Such proposals are, by definition, motivated by content-based considerations. *See Family-Friendly Programming* at 557 n.18 (calling for programming tiers that "contain no elements the average viewer would find offensive," and that "ideally embody an uplifting message"). They would require the government both to define what networks are "family friendly" and to impose these determinations in some way. Any such mandate necessarily would intrude on cable operators' editorial choices regarding the mix of programming services to offer and how they should be combined. *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (interference with editorial control violates the First Amendment); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) ("Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others."); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986). Such compelled speech regulations are presumptively invalid. *E.g.*, *Riley v. National Fed'n of the Blind of North Carolina, Inc.; Secretary of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984).

Under strict scrutiny, it is extremely doubtful that the government could show a compelling interest in requiring à la carte delivery of programming channels or in the creation of "family friendly" tiers. As noted above, the market for multichannel programming is a properly functioning one, and if sufficient demand existed for à la

carte options – both in terms of consumers wishing to purchase the product that way *and* willingness to pay the associated price that unbundling carries – such options would be provided. *See Turner I*, 512 U.S. at 640 ("the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media"). Nor is there a compelling interest in the government protecting MVPD subscribers from "indecent" programming among the bundle of networks they elect to bring into their homes:

> Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling[.] The … argument stems from the idea that parents do not know their children are viewing the material on a scale or frequency to cause concern, or if so, that parents do not want to take affirmative steps to block it and their decisions are to be superseded. The assumptions have not been established[.]

Playboy, 529 U.S. at 825.

An à la carte regime also would not be the least restrictive means of achieving any of the interests the government might proffer. With respect to economic motivations, *i.e.*, keeping MVPD rates or the levels at which they rise within a range that consumers would find acceptable, the government could, as the GAO recommended, take additional steps to foster competition among cable operators, GAO Report at 9-11, either by overbuilders or additional facilities-based competitors in addition to DBS providers. The government also could, if it deemed the ubiquitous availability of multichannel programming at certain rate levels to be sufficiently

important, opt to subsidize multichannel programming just as it does with "universal service" in telecommunications. *See* 47 U.S.C. § 254. *Cf. United States v. American Library Association*, 539 U.S. 194, 211-212 (2003) (subsidies less restrictive than direct content regulation). With respect to control over the content subscribers receive, the V-chip and channel-blocking options that preclude the government's interest from being compelling also are less restrictive means of restricting content that a subscriber finds objectionable. The Supreme Court has expressly held that, where less restrictive options are available, the government must rely on them rather than restricting protected speech. *Ashcroft,* slip op. at 7-9; *Playboy*, 529 U.S. at 819.

Any governmental rules that compel how programming must be sold to consumers, either as stand-alone networks or in thematic tiers, will impose significant burdens on programmers. Existing contracts would be disrupted and business plans on which network growth and development have been based would be scrambled. Not only will this impose a significant burden on particular networks, but the overall availability of programming will be reduced and prices will rise. Such restrictions cannot survive strict First Amendment scrutiny. *Playboy*, 529 U.S. at 812. *See Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 754.

B. À LA CARTE REQUIREMENTS WOULD FAIL INTERMEDIATE FIRST AMENDMENT SCRUTINY

Even if a government-mandated à la carte regime were deemed content-neutral, it would be subject to heightened First Amendment scrutiny in the form of intermediate

review. *Turner I*, 512 U.S. at 662; *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 181-182 (D.C. Cir. 1995) (even with "cable rate regulations, we know . . . that rational basis cannot be the test") ("*Time Warner Rate Case*"). Under this level of scrutiny, the government is required to show that its regulations will directly and materially serve an important interest, and that that policy is narrowly tailored and will restrict no more speech than necessary. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189-90 (1997) ("*Turner II*"). *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). This level of review, though not as stringent as strict scrutiny, is an exacting one that holds "[c]onstitutional authority to impose some [regulation] is not authority to impose any [regulation] imaginable. *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("*Time Warner II*").

1. No Substantial Government Interest Supports Imposing à La Carte Requirements

Before adopting any à la carte rules the government must demonstrate that the harms it seeks to address are "real, not merely conjectural." *Turner I*, 512 U.S. at 664. That is, it must "show a record that validates *the regulations*, not just the abstract statutory authority." *Time Warner II*, 240 F.3d at 1130 (emphasis in original). Thus, the fact that Congress and the FCC have been allowed to regulate cable rates in the past does not support the conclusion that the government has an interest sufficient to dictate the way in which programming must be delivered to subscribers in order to lower costs

or create more choice. Nor would an interest in combating indecency necessarily justify à la carte rules.

An abstract interest in lowering individual cable bills or creating more choice, without more, does not establish the required governmental interest. When last confronted with a similar constitutional question, the D.C. Circuit held that the government had a substantial interest in regulating cable rates because, at that time, Congress had found that only a small percentage of cable operators in the country faced competition from other service providers, and "cable television subscribers have no opportunity to select between competing cable systems." *Time Warner Rate Case*, 56 F.3d at 183-184 (citations omitted). The Commission has since allowed the cable rate regulations to sunset,[63] and the media landscape has evolved greatly as well. Indeed, the Commission has found that with the advent of DBS there is more competition than ever before, *2003 Video Competition Report*, 19 FCC Rcd. at 1608-09, and new broadcast subscription models and the burgeoning delivery of digital multicasting will only bring additional competition to the market. *See* discussion *supra* at p. 8.

In similar circumstances, te court has held that the Commission lacked a "non-speculative" basis for regulations. In *Time Warner Entertainment Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000), the D.C. Circuit had upheld vertical and horizontal ownership regulations against a facial constitutional attack. But just one year later, in

[63] *See supra* note 31.

Time Warner II, the court invalidated FCC rules adopted pursuant to the same statutory provisions, finding that the Commission had failed to support the rules. The court found, for example, that the Commission had failed to present the "substantial evidence" required under intermediate scrutiny to support its interest in preventing collusive behavior. 240 F.3d at 1130-31. One principal reason for this finding was the growth of competitive multichannel video service in the interim:

> Given the substantial changes in the cable industry since publication of the *Third Report* in 1999 and our reversal on other grounds, there is little point in our reviewing the Commission's assessment of then-existing market power of cable MVPDs. But whatever conclusions are to be drawn from the new data, it seems clear that in revisiting the horizontal rules the Commission will have to take into account of the impact of DBS on that market power. Already when the *Third Report* was written, DBS could be considered to "pass every home in the county." [citation omitted] The technological and regulatory changes since then appear only to strengthen petitioners' contention.

Id. at 1134. On the basis of emerging competition, among other things, the court concluded that the Commission had "failed to identify a non-conjectural harm." *Id*. The same considerations would also determine whether the government could come up with a showing sufficient to support à la carte rules.[64]

[64] As noted above, nothing precludes other multichannel programming distributors from offering programmers economic incentives that would facilitate à la carte offerings, yet no MVPD has found there to be sufficient demand that would deliver a competitive advantage from making à la carte options available beyond those that already exist with respect to "premium" channels, pay-per-view and video-on-demand.

2. À La Carte Rules Would Not Serve the Government's Purported Interests

Proponents of à la carte requirements have an obligation to prove that such rules would serve their purported interests in a "direct and material way." *Turner I*, 512 U.S. at 664. Meeting this obligation is more difficult to the extent no single proposal or rationale for à la carte requirements has yet been put forward. But whether such regulation is proposed to protect subscribers from increased cable rates, to increase choice or to shield subscribers from "indecent" programming, any benefits are entirely speculative.

The question of whether à la carte rules would reduce cable rates has received a great deal of attention. As noted earlier in these comments, the Commission, the GAO, independent economists, and the cable industry all have examined the issues underlying à la carte channel offerings in depth, and none have reached the conclusion that requiring operators to offer an à la carte option would reduce rates. The GAO noted the effect on the dual revenue stream that supports most cable networks, the increased marketing and equipment costs, among other factors, and found that "subscribers' monthly cable bills would not necessarily decline under an à la carte system." GAO Report at 36. Even à la carte's strongest proponents provide tepid

support, at best, for the proposition that rates would be reduced.[65] For those who believe cable rates would be reduced under an à la carte scheme, the positive effect would be minimal (and most likely would apply only to the lightest TV viewers who already have a low-cost lifeline option), and would likely be offset by MVPDs' increased equipment and other costs.

Government-mandated à la carte requirements would not sufficiently advance any of the interests reflected in the policy proposals underlying the Public Notice. The GAO has cited – notably, in reporting the position advanced by *advocates* of à la carte – the "tremendous uncertainty regarding the outcome under an à la carte regime," GAO Report at 91, and this burden of uncertainty weighs against the government. The government has the obligation to prove that any policies it adopts will serve its interest in a "direct and material way." *Turner I*, 512 U.S. at 664 (plurality opinion). Thus, speculation that "many people may continue to purchase tiers" is insufficient to support legislation or rules. Put another way, the government cannot constitutionally experiment with regulation of First Amendment-related businesses in hopes that good things will result and bad consequences might be avoided. In this regard, experience with rate regulation teaches that meddling with a fee structure that supports programming is fraught with unintended consequences that undermine the policy. Experience

[65] For example, Consumers Union complained that "GAO understates how many subscribers would benefit from an à la carte approach" and asserts that "perhaps as many as 40 percent … could see their monthly bill decline." GAO Report at 81. Assuming this estimate is correct, it means that sixty percent or more of subscribers would not see their bill decline as a result of à la carte options.

also shows that, even where the government has posited an economic rationale for adopting regulations that have a drastic impact on multichannel speech, the constitutionality of its actions still has depended heavily on extensive congressional study, "unusually detailed statutory findings," and substantial evidence for its conclusions, *Turner II*, 520 U.S. at 195-206; *Turner I*, 512 U.S. at 647, none of which exist to support à la carte requirements. Indeed, detailed studies conducted thus far support the conclusion that à la carte rules would be counter-productive.

The point of this prior experience is that the government is unlikely to have sufficient information to demonstrate in a "direct and material way" that à la carte rules would serve the purpose of controlling programming rates, creating more choice or addressing indecency issues. The government's inability to predict or shape the behavior of multichannel programming markets is further illustrated by the attempt to create Open Video Systems ("OVS") in the Telecommunications Act of 1996. 47 U.S.C. § 573. The OVS example bears some striking similarities to the current effort to force the use of à la carte distribution where such a system has not developed naturally in the multichannel video market.[66] As with à la carte proposals, the impetus for the OVS service came not from the MVPD industry but from government, which adopted OVS

[66] Pursuant to a congressional directive, the FCC established OVS as a new service in which a telephone company, cable operator, or other entity could provide a pool of video channels through which they or other parties could provide a multichannel video service. This service would then be subject to fewer regulatory requirements than the Commission applies to cable systems or other MVPDs. *See* 47 C.F.R. § 76.1500 et seq.

in an effort "to maximize consumer choice of services that best meet their information and entertainment needs" and to promote competition in the MVPD market.[67] But OVS failed in the marketplace because it was legislated into existence without a market-based demand for the service.[68]

The few examples of "real world" experience with à la carte programming offerings do not lend support to efforts to adopt a government policy. In Canada, for example, a minuscule percentage of subscribers avail themselves of the option to purchase channels on a stand-alone basis. As discussed above, of subscribers who receive Court TV Canada, only 0.74 percent purchase the channel à la carte and a Rogers Cable official says that its à la carte buy rate is so small that the company doesn't even track the figure. *See* discussion *supra* at p. 31. If that experience were replicated in the United States, proponents of an à la carte requirement would be unable to claim that the policy directly and materially furthered their goal of controlling rates. To the contrary, it would be reasonable to wonder why policymakers went to the trouble of

[67] Telecommunications Act of 1996 Conference Report, S. Rep.104-230, at 172 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd. 18223, 18229 (1996).

[68] RCN Corp., the only significant holder of OVS certifications or local franchises, recently filed for bankruptcy protection. Christopher Stern, *Starpower Partner Files for Chapter 11*, THE WASHINGTON POST, May 28, 2004, Page E02. While the Commission has acknowledged "difficulties with the OVS regime" and pointed to "other barriers to competition in the MVPD market," 2003 Video Competition Report, 19 FCC Rcd. at 1662, the real problem was the government's inability to engineer the multichannel programming marketplace.

disrupting established business arrangements for such a miniscule result. In short, "the game [is] not worth the candle."[69]

Finally, an à la carte requirement would not promote viewer "choice" in any meaningful sense as articulated by its proponents. While some advocate the purchase of programming networks à la carte as a way to avoid "indecent" programming, such a policy is poorly tailored to achieve the intended objective. The Commission evaluates indecency questions program by program (and, more recently, utterance by utterance) and does not brand entire channels as "indecent." *See generally Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999 (2001). Indeed, even the most rabid proponents of regulation appear to recognize that to do so would paint with too broad a brush.[70]

3. À La Carte Requirements Would Burden More Speech Than Necessary

There also is ample evidence that an à la carte system would burden far more speech than necessary. The detrimental economic impact of à la carte outlined above demonstrates just how overburdensome government interference in this area would

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[69] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 430 (1999) (Breyer, J., concurring in part and dissenting in part).

[70] For example, the Parents Television Council advocates à la carte requirements so that parents can avoid networks such as "MTV . . . and the like," *PTC Promotes Benefits of À La Carte Cable Television Programming*, Press Release (May 5, 2004), yet has listed MTV programming ("Making the Band") in its annual list of shows that best promote family values on cable television. *See*, *PTC's First Annual Top Ten Best & Worst Cable Shows of the 2001/2002 TV Season*, Press Release (Aug. 1, 2002). Moreover, groups such as PTC regularly pepper the Commission with indecency complaints targeting broadcast stations that are required to be carried on the basic tier.

be. *See supra* at pp. 21-26. The loss of subscriber fees and advertising revenues would force virtually all programmers to cut back on the quantity and quality of original programming and ultimately would imperil a significant number of networks. The most likely first victims of the à la carte regime would be niche programmers who already subsist, by design, by appealing to only portions of the total available viewing market, and if they are not the first victims, it will be new networks that are in their embryonic phase or on the verge of launching. As a result, there would be less original programming, fewer options, and less program diversity under an à la carte system.

In *Denver Area Educational Telecommunications Consortium*, the Supreme Court examined the First Amendment implications of regulations that would inhibit "spontaneous" viewing across cable channels and found that such measures imposed too great a First Amendment burden. It invalidated a rule that required an affirmative written request by subscribers for leased access channels dedicated to "indecent" programming, noting that such "restrictions will prevent programmers from broadcasting to viewers who select programs day by day (or, through 'surfing,' minute by minute); to viewers who would like occasionally to watch a few, but not many, or the programs on the 'patently offensive' channel; and to viewers who simply tend to judge a program's value through channel reputation, *i.e.*, by the company it keeps." 518 U.S. at 754. The same analysis applies equally to any rules that would require networks to be available à la carte.

While some may suggest that the small number of takers for à la carte options proves that such regulation would do no harm, such a facile conclusion is unwarranted. Any such regulation would begin by abrogating existing contractual arrangements and would set in motion a process that would likely unravel the economic base on which most programming networks are built. For purposes of constitutional analysis, then, the government faces a dilemma: If few subscribers avail themselves of the à la carte option it cannot demonstrate that the regulation will "directly and materially" advance its purported interest. But if many subscribers buy individual channels, the rules will significantly harm if not destroy existing networks and impede the launch of emerging networks.

The direct negative impact aside, à la carte rules also would overly burden more speech than necessary in that there are a number of obvious, less restrictive alternatives to government-mandated or -assisted à la carte. As noted above, fostering the already substantial competition between MVPDs, V-chip use, and channel-blocking promotion all are less restrictive means of meeting whatever interests the government might advance in support of à la carte requirements. In view of these "plausible, less restrictive alternative[s]," the government would not be able to demonstrate that these options "will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816. *See Ashcroft*, slip op. at 7-9. Because the government must give the less intrusive alternatives a chance to work, and explain why less burdensome alternatives would fail, à la carte

mandates would be overly restrictive. *See Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 758-759.

CONCLUSION

Á la carte rules have been touted by some as a panacea for concerns over multichannel video rates despite multiple studies finding that such regulations would not reduce prices. Now, amid heightened concerns over broadcast indecency, others have advocated á la carte rules as a solution for indecency on cable television. But whether proposed as a form of rate regulation or as content control, á la carte rules would fail to meet their stated objectives and would disrupt a business model that has spawned unprecedented diversity of video programming. Any such regulations not only would be bad policy, but would violate the First Amendment rights of cable programmers.

Respectfully submitted,

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July 15, 2004

Declaration of Debra D'Arinzo

I, Debra D'Arinzo, hereby state as follows:

1. I am Senior Director of Strategy and Planning for Courtroom Television Network LLC ("Court TV"). In this capacity, I am in charge of planning and analysis for advertising sales and affiliate sales for Court TV. Over my 15-year career in the cable television industry, I have been employed in various capacities with cable programmers and cable operators, and my responsibilities have included financial analysis and planning for advertising and affiliate sales. My education includes a Masters of Business Administration in Finance and Marketing from the University of Connecticut and a Bachelor's Degree from Gettysburg College.

2. In my capacity with Court TV, and with the assistance of other Court TV officials, I prepared a model evaluating the potential financial impact on Court TV if the channel were to be sold on an à la carte basis. That model provided several scenarios of how à la carte carriage may impact Court TV, showing results at each of several hypothetical retail pricing points in an à la carte environment.

3. Under each à la carte pricing scenario used in the model, from $5 per month to $1 per month, the model projected results such as: (a) the number of subscribers who are likely to purchase the service on an à la carte basis; (b) the likely impact the availability of à la carte carriage would have on Court TV's carriage on cable systems' expanded basic tier; (c) the revenues that Court TV would realize from license fees from MVPDs; (d) the revenues Court TV would realize from advertising sales; and (e) the overall impact that à la carte carriage would have on Court TV's annual revenue.

4. Among other things, our model revealed that if Court TV were to offer its service to subscribers on an à la carte basis at even $1.00 per month, license fee revenues would likely drop by up to 30% and advertising revenues would reach only 12% of their expected 2005 levels. In addition, the model demonstrates that in an à la carte environment, Court TV would have to charge customers at least $5.00 per month and maintain at least 85% of its current expanded basic carriage in order to achieve a revenue level where Court TV could earn a profit.

5. The assumptions on which the model was based came from a variety of experienced executives within Court TV, and were rooted in our real-world experience in finance and sales for Court TV and other networks, as well as from cable industry sourcebooks. For example, our assumptions concerning likely à la carte penetration at various pricing levels were based on Court TV's internal research comparing its cumulative viewership at various dayparts with its "core" viewership who most consistently view the channel and who are most likely to continue viewing on an à la carte basis. This evaluation was prepared with the assistance of Galen Jones, Court TV's Chief Strategy Officer. Our assumptions concerning license fees were also based on our knowledge of the percentage of retail rates that are typically retained by "premium" cable networks, which are currently carried on an à la carte basis.

6. The determination of Court TV's likely advertising revenues under different pricing scenarios were based on my knowledge of historical advertising sales trends from Court TV and other cable networks and were prepared with the assistance of David Epstein, Court TV's Senior Vice President of Planning and Pricing.

7. Although the model was based on certain assumptions, and there is currently no way to predict how many subscribers would abandon current tiers and move to à la carte channel purchases, to the best of my knowledge, the Court TV model nonetheless provides valid projections and conclusions as to the severe financial impact that à la carte carriage would have on Court TV.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Debra D'Arinzo

July 1, 2004